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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

In re

PROFESSIONAL FINANCIAL INVESTORS, INC., *et al*.,

Debtors.

Case No. 20-30604
(Jointly Administered)
Chapter 11

OMNIBUS REPLY TO OMNIBUS OBJECTION FILED BY U.S. SECURITIES AND EXCHANGE COMMISSION TO FINAL FEE APPLICATIONS FILED BY BANKRUPTCY COUNSEL FOR THE DEBTORS AND COMMITTEES

Date: March 31, 2022
Time: 10:00 a.m.
Place: **Telephonic/Video Appearances Only**
450 Golden Gate Avenue, 16th Floor
Courtroom 19
San Francisco, CA 94102
Judge: Hon. Hannah L. Blumenstiel

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Sheppard, Mullin, Richter & Hampton LLP ("Sheppard Mullin"), Trodella & Lapping LLP ("Trodella Lapping"), Pachulski Stang Ziehl & Jones LLP ("Pachulski"), Baker & Hostetler LLP ("Baker"), and Sklar Kirsh, LLP ("Sklar"), each for and on behalf of themselves, and DLA Piper LLP for and on behalf of FTI Consulting, Inc. ("FTI") submit this omnibus reply (the "Reply") to the *Omnibus Objection by U.S. Securities and Exchange Commission to Final Fee Applications Filed by Bankruptcy Counsel for the Debtors and Committees* (the "SEC Objection") filed by the U.S. Securities and Exchange Commission (the "SEC") on March 9, 2022 as Dkt. No. 1308 and to the letters sent by investors to this Court.[1] In support of this Reply and in further support of the Fee Applications,[2] the Professionals[3] respectfully represent as follows:

I.
PRELIMINARY STATEMENT

The Professionals do not dispute that these cases were expensive. By any measurement, $30 million in professional fees is a lot of money. We are sympathetic to all investors and understand the concern, anger, and frustration expressed regarding the total amount of the fees incurred in these cases. But that frustration is misdirected. The cause of that frustration is not the Professionals who worked diligently, creatively, and efficiently to minimize the harm that was caused by Ken Casey and Lewis Wallach. Given all of the hard work of the members of the investor community and the Professionals to minimize the harm associated with the fraud, it is concerning that the SEC appears to have led investors to believe it is customary for professionals in chapter 11 cases involving individual victims to reduce fees by 30 to 40 percent, and that because the Professionals here did not, the investors have been victimized a second time. As set forth below, neither the law nor the facts support that contention. To the contrary, when compared

[1] Notwithstanding that the vast majority, if not all, of such letters do not fully comply with this Court's *Order Regarding Letters to Judge Blumenstiel* entered as Dkt. No. 1001, in this Reply the Professionals address the main arguments raised in the investor letters, while reserving all rights as to those letters.

[2] The term "Fee Applications" refers to, collectively, the final fee applications of, Pachulski, FTI, Trodella Lapping, Sklar, Baker, and Sheppard Mullin filed as Dkt. Nos. 1083, 1089, 1090, 1092, 1095, and 1097, respectively. Several of the Fee Applications have been supplemented by subsequent filings or declarations being made concurrently and those subsequent filings or declarations are incorporated by reference in this Reply.

[3] The term "Professionals" refers to, collectively, Sheppard Mullin, Trodella Lapping, Pachulski, Baker, Sklar, and FTI. FTI is party to this Reply because it is subject to some of the arguments made in the investor letters.

to other chapter 11 cases involving individual victims, the voluntary, up-front discounts that were provided here exceed the discounts in those other matters and the Professionals' rates here are well below "market," especially in light of the complexity of these cases. The Professionals deeply regret the distress this misperception has caused within the community as evidenced by the letters that have been submitted to the Court. Nonetheless, neither those letters nor the SEC Objection serve as a basis to deny or reduce the requested fees. This is an unfortunate situation, but the Professionals have made the outcome here better, not worse.

II.
THE COURT SHOULD OVERRULE THE SEC OBJECTION

A. The SEC Objection is Built on a Distortion of Section 330's Statutory Lens

The standard for approval of fees is determined by 11 U.S.C. § 330. Courts in the Ninth Circuit often use the following standard in evaluating the reasonableness of professional fees under section 330 of the Bankruptcy Code:

1) Are the services which are the subject of the application properly compensable services?

2) If so, were they necessary and is the performance of the necessary tasks adequately documented?

3) If so, how will they be valued? Were they necessary tasks performed within a reasonable amount of time and what is the reasonable value of that time?

See In re Thrifty Oil Co., 205 B.R. 1009, 1019-20 (Bankr. S.D. Cal. 1997) (citing *Unsecured Creditor's Committee v. Puget Sound Plywood, Inc*., 924 F.2d 955, 957-58 (9th Cir. 1990)); *see also In re Strand*, 375 F.3d 854, 860 (9th Cir. 2004)

No one questions that the Professionals' services, which were directed by the Debtors or the Committees, are properly compensable. Similarly, there is no issue about whether the Professionals' services were necessary and adequately documented. Lastly, there is no questioning whether the Professionals' services were timely. Instead, the SEC takes great pains – with scant legal and evidentiary support - to claim the Professionals' services were not reasonably valued. As courts and the Office of the United States Trustee ("UST") have recognized,

"[g]enerally, so long as the rates being charged are the applicant's normal rates charged in bankruptcy or non-bankruptcy matters alike, they will be afforded a presumption of reasonableness." 3 Legal Manual for United States Trustees, 3-7.1, quoting *In re Jefsaba, Inc*. 172 B.R. 787, 798 (Bankr. E.D. Pa. 1994).

Given the effort expended, the often substantially discounted rates charged, the complexity of these cases, and the final results achieved, the Professionals submit that the compensation requested in the Fee Applications is reasonable under the standard set forth in section 330, the Federal Bankruptcy Rules, guidelines promulgated by the UST, and prevailing case law.

B. <u>The SEC's Focus on the Rates Charged in this Division Only is Unduly Parochial and Undermines the Intent of the Bankruptcy Code</u>

The SEC is correct that, as a general rule, prevailing market rates should be determined with reference to the "relevant community," which is generally where the court sits. But extensive case law makes clear that there are recognized exceptions to the general rule and that an overly formulaic application of the rule works against the policies and goals of complex bankruptcy cases. *See, e.g., Barjon v. Dalton*, 132 F.3d 496, 500, 501-02 (9th Cir. 1997); *Zolfo, Cooper & Co. v. Sunbeam-Oster Co.*, 50 F.3d 253 (3d Cir. 1995) (baseline rule is for firms to be paid their customary rates); *In re Robertson Cos.*, 123 B.R. 616 (Bankr. D.N.D. 1990) (restriction of fees to typical local rates is unduly parochial in light of national and regional law firms working on larger and more complex bankruptcy cases with more than local import); *In re Frontier Airlines, Inc.*, 74 B.R. 973 (Bankr. D. Colo. 1987) (foreign counsel may charge normal hourly billing rates, even if in excess of local billing rates).

As the Bankruptcy Court for the District of Arizona has stated:

> Many large cases, which have involved the nation's bankruptcy courts, illustrate that the practice of bankruptcy law has become national in scope. … When one factors in that the Debtor's counsel of choice is a large single law firm with offices and expertise located in various parts of the nation, one must question whether the simple paradigm of "local law firm / local rates" has meaningful application. At the least, the complex facts of this case and the need for special expertise present circumstances which require looking beyond the local community rates. So long as the ultimate amount requested is, on the whole, reasonable for the type of case and work

> involved, the fee can be approved. … The nature and scope of this case is of the type where exceptions swallow the rule.

In re First Magnus Fin. Corp., Case No. 4:07-bk-01578-JMM, 2008 Bankr. LEXIS 4949, **6-8 (Bankr. D. Ariz. May 22, 2008); *see also Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 493 F.3d 110, 119 (2d Cir. 2007) (by definition, the market rate for legal work is the rate that a "reasonable, paying client" would pay); *Hawaiian Airlines, Inc. v. Mesa Air Group, Inc. (In re Hawaiian Airlines, Inc.)*, Case No. 03-00817, 2008 Bankr. LEXIS 1501, **8-12 (Bankr. D. Haw. Jan. 22, 2008) (prevailing party awarded attorney's fees at Los Angeles rates over customary local, Hawaii rates).

Limiting rates to those customarily charged locally would be contradictory to the bankruptcy policy of attracting experienced professionals to bankruptcy cases, regardless of where the case is pending. *See e.g., In re Baldwin United Corp.*, 36 B.R. 401 (Bankr. S.D. Ohio 1984); *In re Easterday Ranches, Inc., et al*. (Bankr. E.D. Wash., August 25, 2021), Verbatim Transcription of Proceedings from Audio File at 38-41, 49-55. As the Bankruptcy Court for the Eastern District of Washington has recently stated:

> I reject the view that there should be a categorical cap based on local rates or that local rates define by reference to what local practitioners charge in all cases set the ceiling for anything near a ceiling on the appropriate hourly rate in a given case . . . I think judges in jurisdictions that use the local rate concept are ultimately doing their district a disservice . . . I don't think that approach is mandatory, let alone even supported by the text of the [statute] or really the policy that Congress was attempting to advance when section 330 was codified in 1978 . . . I think the appropriate weight is better assessed, as I said, in a holistic fashion by situating the case in terms of the relevant community, perhaps. Here, the community would be a large megacase.[4]

In re Easterday Ranches, Inc., et al. (Bankr. E.D. Wash., August 25, 2021), Verbatim Transcription of Proceedings from Audio File at 49-50.

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[4] *Easterday* is a chapter 11 liquidation case pending in Yakima, Washington in which the U.S. Trustee objected to a fee application submitted by Pachulski as debtor's counsel on the basis the requested compensation was unreasonable. *Objection to First Interim Fee Application, In re Easterday Ranches, Inc., et al.*, No. 21-00141, (Bankr. E.D. Wash., July 23, 2021), ECF No. 933. Pachulski's application reflected a blended billing rate of $1,053 per hour, with attorney billing rates ranging from $695 to $1,695 per hour. *Id*. at 6:10-11. The U.S. Trustee noted that rate was "substantially higher than the blended rate charged by other lead debtor's counsel in recent cases in this district which highest was $800." *Id*. at 11-14. The U.S. Trustee's objection was overruled, in part, on the basis noted above.

The circumstances of these cases justify honoring the Debtors' and Committees' choice of professionals and payment of each Professional's fees in the amount requested.

C. The Woodbridge Case Provides the Most Appropriate Comparison

The SEC Objection acknowledges that "when awarding professional compensation for services in a Ponzi scheme, the Court should consider compensation awarded to comparably skilled attorneys in other Ponzi scheme cases." [SEC Objection at 4]. Yet somehow the SEC failed to consider the rates and fees approved in the *Woodbridge* bankruptcy, the most comparable recent Ponzi case administered through Chapter 11.[5]

Notably, the SEC (represented by Mr. Baddley) played an active role in *Woodbridge*, a case in which the blended rates of bankruptcy counsel[6] for the debtors and committees exceeded the hourly rates sought here notwithstanding the passage of three years' time, as set forth below:

WOODBRIDGE – 2017	
Role	**Blended Rate**
Debtors' Counsel	$787.85[7]
UCC Counsel	$966.73
Ad Hoc Noteholder Counsel	$739.42
Ad Hoc Unitholder Counsel	$827.89

PFI – 2020	
Role	**Blended Rate**
Debtors' Counsel	$736.52[8]
UCC Counsel	$777.40
Ad Hoc DOT Counsel	$675.86
Ad Hoc LLC Counsel	$663.67

[5] *In re Woodbridge Group of Companies, LLC, et al.* ("Woodbridge"), No. 17-12560 (Bankr. D. Del. Dec. 4, 2017). Woodbridge and its related entities operated as a real estate finance and development company that bought, improved and sold high-end luxury homes. To fund its operations, Woodbridge fraudulently raised over $1 billion from individuals. The organization of the bankruptcy cases was similar to the situation here, where holders of different investment vehicles were represented by two ad hoc committees in addition to the UCC. The time between the filing date and plan confirmation date for both cases was approximately 11 months. While the Ponzi scheme in *Woodbridge* is by some measures larger (for example, the number of investors and netted claim pool exceed those in PFI), the complexity posed as a result of PFI's poor records was significantly greater. *See* Declaration of Cecily Dumas filed concurrently with this Reply citing difficulties regarding the Debtors' records.

[6] Consistent with the SEC's own analysis rubric, non-bankruptcy special counsel to the *Woodbridge* debtors and committees were excluded.

[7] Derived from a weighted average of the blended rates as set forth in the Declaration of Cia Mackle filed concurrently with this Reply (the "Mackle Declaration").

[8] Derived from a weighted average of the blended rates as set forth in the Mackle Declaration.

And this is the case even though the approved rates in *Woodbridge* are two to three years out-of-date, and would have been considerably higher if 2020 or 2021 rates applied. Further, the Professionals have already provided discounts far greater than those the SEC agreed to in *Woodbridge*. In *Woodbridge*, the professionals' discounts provided *after* discussions with the SEC were generally 5% off of then-standard billing rates. Mackle Declaration, ¶7.

The overall approved fees in *Woodbridge* (almost $60 million in total with $43 million being incurred pre-effective date) far exceed those sought in this case.[9] While the initial distribution in *Woodbridge* occurred at approximately the same time as it did here relative to the petition date, that distribution only represented a 3.5%-4.5% recovery on claims – smaller than this case by a factor of almost 10.[10]

The Professionals submit that *Woodbridge* provides the yardstick for considering the reasonableness of the fees applied for, and when measuring against that yardstick there can be no question that the professional fees in these very similar cases are fair and reasonable.

D. <u>These Cases Were Unusually Complex</u>[11]

The SEC Objection's single-minded focus on contrasting the Professionals' rates to "comparables" fails to properly take the complexity of these cases into account.

These cases involved fraud on a massive scale. The Debtors' Ponzi scheme took place over at least fourteen years, spanned forty-three total debtors, and involved hundreds of millions of dollars. The scheme was conducted largely through paper-based records, many of which were crafted to obscure the transactions that had actually occurred. Moreover, the fraud had a direct impact on over 1,800 investors, residing domestically and internationally. These investors took various forms, each of which had a unique set of interests.

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[9] The total professional fees sought in these cases are approximately $30 million, with post-effective date professional fees budgeted at just $3.625 million because the Debtors and the UCC completed much of the traditional post-effective date work during the pendency of the cases. Not only have claims here been almost entirely resolved, the vast majority of the unsecured creditor distribution (36% thus far) has already been made.

[10] Additional distributions in *Woodbridge* have continued in the years since the initial distribution, but they have only recently begun to approximate the initial distribution already received by PFI investors.

[11] The facts in this section D are supported by the concurrently filed declarations of Michael Goldberg, Cecily Dumas, Ori Katz, and Andrew Hinkelman, and the previously filed declarations of Greg Gotthardt [Dkt. No. 909] and David Alfaro [Dkt. No. 595].

In addition, during the course of these cases the Debtors owned and operated more than 60 total apartment buildings and office complexes and obtained title to two residential homes. The Debtors have sold all but one of these properties pursuant to Court-approved sales,[12] including 60 in a single transaction. Because the Debtors' real estate portfolio was the product of massive fraud and the pre-petition Debtors did not engage in best (or even standard) practices in connection with the acquisition and maintenance of their property portfolio, the Professionals were faced with challenges at every turn.

Successfully unraveling the fraud, balancing investors' competing interests, and selling the Debtors' numerous properties was critical to achieving the elegant resolution embodied in the Debtors' Plan. The efficiency with which the Plan was confirmed (and modified) is extraordinary given the challenges involved. Even more telling was the level of investor support for the Plan. More than 99.7% of the ballots cast by investors were in favor of the Plan. [13] Because of the speed in which all of this was achieved and the overwhelming support of the constituencies involved, the investors have already received initial distributions of approximately 36% of their netted claim.[14]

E. <u>Even if Local Rates Were the Yardstick (Which They are Not) the SEC Objection "Cherry Picks" Cases and Professionals that are Not Comparable</u>

The SEC's analysis that the average rate for attorneys representing debtors or trustees in Chapter 11 cases in the San Francisco Division is $510 per hour is flawed for two reasons. First, the SEC's analysis is overwhelmingly composed of attorneys who appeared in non-comparable cases that would never be called "complex," including many individual debtor cases. Second, the SEC excluded the Goodwin Procter attorneys who represented the debtor in the *Levandowski* case.

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[12] The Debtors' anticipate closing on the Court-approved sale of the remaining property, located at 523 4th Street and 535-545 4th Street/930 Irwin Street, San Rafael, California, around the time of the hearing on the Fee Applications.

[13] *Declaration of John Burlacu*, Dkt. No. 650-1.

[14] This percentage is within the 35-50% percent of "netted claims" (or "Allowed Claims" for the TICs) that investors were predicted to receive under the Plan as set forth in the Court-approved Disclosure Statement filed on April 16, 2021 as Dkt. No. 572.

1. The SEC Objection Includes Attorneys in Non-Comparable Cases

The Baddley Declaration provides a list of thirty-eight attorneys whose rates appear in fee applications or employment applications filed in this district in 2021 and who represented debtors or Chapter 11 trustees. These rates are then averaged giving equal weight to each attorney's rate. However, with the single exception of the *Levandowski* case,[15] every case that the SEC deems "comparable" for its' rate analysis was an individual or small business in non-complex cases in which no creditors committee was even appointed. The vast majority of these debtors were represented by sole-practitioners or firms with just a few attorneys. The circumstances of the PFI case would not have permitted sole-practitioners or very small firms to handle the primary engagements.[16] The circumstances required firms with special expertise to address the attendant complexities in an efficient manner, a factor regularly recognized by courts assessing fee applications. *In re First Magnus Fin. Corp.*, Case No. 4:07-bk-01578-JMM, 2008 Bankr. LEXIS 4949, **6-8 (Bankr. D. Ariz. May 22, 2008) (citing *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992); *Xiao-Yue Gu v. Hughes STX Corp.*, 127 F. Supp. 2d 751, 767 (D. Md. 2001); *Atlantic States Legal Foundation, Inc. v. Onondaga Dept. of Drainage & Sanitation*, 899 F. Supp. 84, 89-90 (N.D. N.Y. 1995)). As a result, all of the attorneys named in the chart attached as Exhibit A should be removed from the SEC's list on the grounds that none of them were positioned to handle large, complex bankruptcy cases like these.

Ironically, the removal of the aforementioned "comps" results in the entire Baddley Declaration list being reduced to the *Levandowski* bankruptcy case. Notably, the SEC excludes the rates of two Goodwin Procter bankruptcy attorneys whose time is accounted for in the firm's fee applications in 2021.

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[15] The SEC also included Sacramento-based attorneys representing the plan administrator in the *Heller Ehrman* case, although the Baddley Declaration states he only included attorneys representing debtors or Chapter 11 trustees. In addition to not meeting the stated standard for inclusion in the list, work performed representing a plan administrator eleven years after the plan was confirmed is inappropriate because those attorneys were not performing comparably complex tasks so late in the proceedings. *In fact, Pachulski served as counsel to the Debtors when the complex work was undertaken and the court compensated the firm at its then prevailing hourly rates.*

[16] *See* the Declaration of Richard A. Lapping filed concurrently with this Reply.

Including the two attorneys in the calculation regarding Goodwin Procter's blended rate results in a $154 per hour increase in the SEC's proposed $510 blended rate benchmark for an attorney with twelve (rather than twenty-four) years of experience:

Attorney	Case	Billing Rate	Year of Admission
Nathan Schultz[17]	*In re Anthony Scott Levandowski*, Case No. 20-30242	$ 867.00	2010
Artem Skorostensky[18]		$ 629.00	2017
Tobias Keller		$ 900.00	1990
Dara L. Silveira		$ 500.00	2010
Danisha Brar		$ 425.00	2016
Average		**$ 664.20**	**2009**

2. The SEC Objection Fails to Include Other Divisions or 2020 Fee Applications

The aforementioned analysis makes clear that only one case in the San Francisco Division for which fee applications were filed in 2021 is potentially comparable as a means of assessing the fairness of the rates charged in this case. Rather than look to non-comparable cases to obtain a wider sample as the SEC did, a better approach would have been the inclusion of cases for which fee applications were filed in 2020, or the inclusion of cases in other divisions of the Northern district. That methodology would have captured at least the following:

Case		Attorney Billing Rates Approved	Blended Rate (2018-2020)
In re Sedgwick, LLP, Case No. 18-31087	Pachulski Stang Ziehl & Jones, LLP (debtor's counsel) [Dkt. No. 337]	$575.00 to $1,145.00	$761.07
	Sheppard Mullin Richter & Hampton (UCC counsel) [Dkt. No. 379]	$615.00 to $795.00	$674.79
	Pillsbury Winthrop Shaw Pittman LLP (initial UCC counsel) [Dkt. No. 175]	$600.00 to $785.00	$681.71

[17] Excluded from SEC's analysis of comparable cases.

[18] Excluded from SEC's analysis of comparable cases.

Case		Attorney Billing Rates Approved	Blended Rate (2018-2020)
In re Wave Computing, Inc., Case No. 20-50682	Sidley LLP (debtors' counsel) [Dkt. No. 1282]	$590.00 to $1,390.00	$908.36 (attorneys only)
	Hogan Lovells US LLP (UCC counsel) [Dkt. No. 1263]	$610.00 to $1,550.00	$965.00 (attorneys only)

These comparable cases, which include rates dating to 2018, demonstrate that hourly rates sought here are well within the market for bankruptcy attorneys performing services in complex reorganizations in this district.

Finally, the SEC argues that in the *PG&E* case filed in this district, the largest bankruptcy case in California history, the blended rates of attorneys were lower than this case. The blended rate cited by the SEC is not a true comparison for two reasons. First, the blended rates of Cravath Swaine & Moore LLP ("Cravath"), co-counsel for the Debtors ($624), and Baker & Hostetler LLP, counsel to the Official Committee of Tort Claimants ($634), are skewed lower because unlike the other case professionals, some non-bankruptcy professionals in those two firms spent large amounts of time preparing for fire litigation at lower blended litigation rates. The comparison of the blended rates of Weil Gotshal & Manges LLP, PG&E's lead bankruptcy counsel ($948) and Milbank Tweed Hadley & McCoy ("Milbank's"), counsel to the official committee of unsecured creditors of PG&E ($987), for a blended rate of $967.50 for the bankruptcy-related work is a more informative comparison.[19] Second, the SEC includes various non-bankruptcy special counsel in *PG&E* while omitting special counsel in its chart for these cases.

F. The Three Committee Structure Was Essential and Saved Time and Money

While the SEC Objection focuses on blended rates, it is worth briefly addressing the investors' concerns regarding the payment of fees for two *ad hoc* committees in addition to the official committee. The legal costs easily could have doubled here if the LLC members and DOT

[19] Notably, Milbank's final fee application in *PG&E* shows that it charged an associate that had *not even been admitted to practice yet* at up to $625 per hour. Cravath's final fee application in *PG&E* also showed that it charged $595 per hour for an associate that had not yet been admitted to practice.

noteholders had not been organized into groups and been given a budget so that experienced counsel could negotiate a compromise with the Debtors and the official committee. This is because any outcome other than the compromise reached would have required lengthy litigation. For instance, there could have been litigation to subordinate the interests of the LLC members. Or litigation to enforce or to set aside the DOT liens. Or, more likely, both issues would have been litigated, resulting in investors suing one another for priority of payment on claims in lawsuits that lasted for years. It is difficult to quantify saved costs, but that is what the Professionals were able to achieve using the three committee structure.

G. The UST did not Object to the Professionals' Rates or the Fee Applications.

It is telling that the UST is not echoing the SEC's concerns regarding the Professionals' hourly rates, particularly given the SEC initially raised the same concerns long ago. The UST is regularly involved in Chapter 11 cases in this division. Given the UST's familiarity here, one would expect that if the Professionals' rates truly were out of sync with the local market or the complexity of these bankruptcy cases, the UST would have raised similar objections as the SEC.

The UST's involvement here included identifying issues with numerous interim and final fee applications and negotiating additional discounts or other modifications with affected Professionals. Regarding the Fee Applications in particular, on March 9, 2022, the UST filed an Omnibus Response (the "UST Response") which stated the UST had reviewed the Fee Applications, "identified issues concerning the reasonableness of the fees sought and reached agreements with all professionals to resolve possible objections to the fee application for this final period prior to the hearing." Nowhere in the UST Response is there any indication that the UST's office, which is deeply familiar with the rates charged in this local market, has any objection to the rates charged by any of the Professionals.

H. The SEC Objection "Cherry Picks" Examples of Public Interest Fee Reductions

The SEC Objection asserts that the Court should consider the nature of the creditor body ("a substantial number of individuals victimized by the debtor's long-running Ponzi scheme") in determining reasonable compensation, setting forth the professional fees charged in five Ponzi cases (four receivership cases and only one bankruptcy case). The premise that professionals' fees

should be subject to a reduction any time investors have been defrauded creates an unworkable standard that will discourage attorneys from taking such representations, especially in light of the many types of victims (including victims of sex abuse and opioid addiction to name just two) who do not receive 30 or 40 percent discounts that the investor letters suggest some PFI investors have been led to expect by the SEC.

If the Court agreed to treat Ponzi cases as a special exception to Section 330, then the SEC Objection asserts the Court should "compare the requested compensation to the compensation *customarily awarded* in other Ponzi scheme cases," [SEC Objection at 14 (emphasis added)]. However, the selection of five cherry-picked cases (only one of which is a bankruptcy case) cannot establish a level of "customary" compensation.[20]

Bankruptcy cases are replete with examples of unimaginable victimization, but attempting to weigh the distress from different harms inflicted on creditors in determining the reasonableness of fees is unworkable, contrary to the Bankruptcy Code, and damaging to victims. The Court should reject the call to create new law in this regard.[21] Further, utilizing the existence of a Ponzi scheme as a standard in reasonableness ignores that Ponzi schemes, and their unravelling, are all different. The level of expertise required to administer a Ponzi in which real properties must be operated and sold (and title defects cleared) during a case in which multiple types of creditors with different legal arguments as to priority are victims, is vastly different from a Ponzi scheme in which there is no real business or asset to administer.

Next, the SEC Objection has not established what "customary" compensation would be. First, the SEC's reliance on receivership cases as a means of determining what is customary in a

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[20] Further, the examples cited in the SEC Objection tell a more mixed story than the SEC presents. For example, in the *Stanford* Ponzi case, as of April 30, 2021 (more than a decade after the receivership commenced), the court-appointed receiver had recovered approximately $1 billion of the roughly $5 billion in investor losses, and paid fees to professionals amounting to $263 million. Authorized distributions were $549 million and provided a distribution of 11.1%. The blended rate for a single professional's work performed more than a decade after the major work was done does not supply an appropriate "comp." [Case 3:09-cv-00298-N; Dkt. No. 3086].

[21] Judge Holt addressed this very issue in *Easterday*, noting that, in his estimation, a court could not force a professional to cap fees or not charge its normal hourly rates in cases with public interest overlays. *In re Easterday Ranches, Inc., et al.* (Bankr. E.D. Wash., August 25, 2021), Verbatim Transcription of Proceedings from Audio File at 35-6.

Chapter 11 Ponzi case is wholly inappropriate. Receivership cases are very different from bankruptcy cases for several reasons. At the very least, no order issued in a receivership would have given a title company sufficient comfort to close on a portfolio sale of the Debtors' properties.

The SEC's remaining reference is to a *single* Chapter 11 Ponzi case (*1 Global Capital, LLC*, Case No. 18-19121 (Bankr. S.D. Fla. July 27, 2018) in which debtors' counsel agreed in 2018, at the commencement of the case, to a 20% fee reduction with a maximum hourly rate of $750 (which ultimately equated to a blended rate of $503.69)[22] This one case does not establish (1) that there exists a customary discount for bankruptcy attorneys retained in Ponzi cases, much less that one should be mandated by the Court after fees were agreed to by the clients and the fees were incurred or (2) a customary blended rate for attorneys employed in Chapter 11 Ponzi cases.

The Professionals do not believe that any "customary" discount for Chapter 11 Ponzi cases exists. Rather, a firm's decision to extend a discount at the commencement of the case is a reflection of the economic bargain a firm makes with its client and is based on factors such as desire to obtain the representation in relation to the firm's existing or anticipated case load. The Professionals here have represented a variety of debtors, chapter 11 trustees, and committees in a wide range of "victim" and fraud bankruptcy cases – far greater than the sample size of five provided by the SEC – and represent to the Court that fee reductions of 20% are not at all "customary" and are instead very much an outlier.[23]

As set forth above, in *Woodbridge*, a significantly more comparable case where the SEC agreed to the professionals' 5% discount, the blended rates of the attorneys representing the debtors and committees ranged from $739.42 to $966.73.

Blended rates exceeding those sought here have been approved in a variety of recent victim cases, including:

[22] As set forth in the final fee application of Greenberg Traurig. Case No. 18-19121, Dkt. No. 966 at p. 15.

[23] As set forth in several of the declarations supporting this Reply, the lead Professionals do not believe that fee reductions of 20% are customary in victim-specific bankruptcy cases.

Case	Firm	Blended Rate
In re USA Gymnastics, Case No. 18-09108 (Bankr. S.D. Ind.)	Jenner & Block LLP (debtor's counsel) [Dkt. No. 1423]	$832.61
	Pachulski Stang Ziehl & Jones LLP (committee counsel) [Dkt No. 1421]	$988.03
In re The Weinstein Company Holdings LLC, Case No. 18-10601 (Bankr. D. Del.)	Cravath, Swaine & Moore LLP (debtors' counsel) [Dkt. No. 3313]	$1,087.90
	Pachulski Stang Ziehl & Jones LLP (committee counsel) [Dkt. No. 3316]	$853.22
In re Boy Scouts of America, Case No. 20-10343 (Bankr. D. Del.)[24]	White & Case LLP (debtors' counsel) [Dkt. No. 9385]*	$966.14
	Pachulski Stang Ziehl & Jones LLP (committee counsel) [Dkt. No. 8720]*	$962.30
In re Mallinckrodt plc, Case No. 20-12522 (Bankr. D. Del.)	Latham & Watkins LLP (debtors' counsel) [Dkt. No. 6774]	$1,058.95
	Akin Gump Strauss Hauer & Feld LLP (opiod-related committee counsel)* [Dkt. No. 6441]	$967.00
	Cooley LLP (committee counsel) [Dkt. No. 6801]	$1,113.43
In re DPMB, Case No. 20-30080 (Bankr. W.D.N.C.)	Jones Day (debtor's counsel) [Dkt. No. 1335]	$1,011.54
	Robinson & Cole LLP (committee of asbestos personal injury claimants) [Dkt. No. 1231]	$764.73

These cases make clear that the rates sought by the Professionals are well within those sought and approved in victim-specific cases throughout the country.

I. The Professionals' Billing Rates and Budget Projections Were Accepted by their Respective Clients and Widely Circulated

The SEC Objection also fails to acknowledge or account for the fact the Professionals' rates were agreed to by their respective clients. In each instance, the client - whether it was the Debtors, unsecured creditors committee, or one of the *ad hoc* committees - selected its Professional(s) after considering other options and with full knowledge of the rates that would be charged. This informed selection should be given deference as long-standing public policy favors permitting parties to retain professionals of their choice. *In re Christ's Church of Golden Rule*, 157 F.2d 910, 911 (9th Cir. 1946) ("'The relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together

[24] Blended rates for this case include paraprofessionals.

harmoniously. Only in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel . . .'") (quoting *In re Mandell*, 69 F.2d 830, 831 (2d Cir. 1934)); *Smith v. Geltzer*, 507 F.3d 64, 71 (2d Cir. 2007) (bankruptcy court should interfere with the trustee's choice of counsel "'[o]nly in the rarest cases,'" such as when the proposed attorney has a conflict of interest, or when it is clear that "'the best interest of the estate'" would not be served by the trustee's choice) (quoting *Mandell*); 3 COLLIER ON BANKRUPTCY ¶ 327.04 (Alan W. Resnick & Harry J. Sommer eds., 16th ed.) (in the absence of a legitimate or material conflict of interest, "failure to approve the trustee's selection [of counsel] in the absence of good reason has been called an abuse of judicial discretion"); *In re Malhotra*, No. 2:16-bk-02608-DPC, 2016 Bankr. LEXIS 2521, *8 (Bankr. D. Ariz. July 7, 2016) (same, citing *Christ's Church*, *Mandell* and Collier); *In re Shore*, No. 03-43072, 2004 Bankr. LEXIS 1432, at *11 (Bankr. D. Kan. May 14, 2004) ("a debtor's choice of counsel is entitled to great deference").

The Professionals have provided appropriate notice to interested parties of their fees. The hourly rates for the Debtors' and Committees' Professionals and the official committee's counsel were set forth in their respective employment applications filed with the Court. Monthly estimates of fees for each of the Professionals were also included in the Debtors' monthly operating reports. And accrued fees for each of the Professionals were identified in every omnibus notice of hearing on fee applications that was served on all creditors. So to the degree that parties express surprise at the Professionals' hourly rates and aggregate fees incurred, that surprise is misplaced.

III.

CONCLUSION

Wherefore, for the reasons set forth above, the Professionals respectfully request the Court overrule the SEC Objection and approve each of the Fee Applications as submitted.

Dated: March 21, 2022

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Dated: March 21, 2022

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Dated: March 21, 2022

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Dated: March 21, 2022

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Dated: March 21, 2022

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RICHARD A. CHESLEY
SHELBY NACE

Counsel for FTI Consulting, Inc.

EXHIBIT A

Attorney	Billing Rate	Year Admitted	Case	Select Information Regarding Case and Counsel
Arasto Farsad	$350	2010	*In re Miller Martinez Fernando & Malou Pangilinan Fernando, Case No. 21-30336-WJL*	Individual Debtor: Yes Firm Size: 2 attorneys Minimal Assets/Liabilities[1]: Yes Total Docket Entries[2]: 57 Committee Appointed: No
Brian A. Barboza	$300	2008	*In re Esly Figueroa*, Case No. 21-30146-HLB	Individual Debtor: Yes Firm Size: Sole Practitioner Minimal Assets/Liabilities: Yes Total Docket Entries: 105 Committee Appointed: No
E. Vincent Wood	$425	2014	*In re Edward Leonard Loev*, Case No. 21-30252-HLB	Individual Debtor: Yes Firm Size: Sole Practitioner Minimal Assets/Liabilities: Yes Total Docket Entries: 108 Committee Appointed: No
Eric J. Gravel	$400	2008	*In re Khosro Farahani*, Case No. 21-30571	Individual Debtor: Yes Firm Size: Sole Practitioner Minimal Assets/Liabilities: Yes Total Docket Entries: 46 Committee Appointed: No
Stephen D. Finestone	$525	1986	*In re Donald J. Putterman and Marla A. Sturges, Case No. 21-30353*	Individual Debtor: Yes Subchapter 5 case Firm Size: 4 attorneys Minimal Assets/Liabilities: Yes Total Docket Entries: 88 Committee Appointed: No
Jennifer C. Hayes	$525	1998		
Johnson C. Lee	$385	2007		
James A. Shepherd	$450	2009	*In re Frederick Rhode Stoddard, Case No. 21-30329-WJL*	Individual Debtor: Yes Firm Size: Sole Practitioner Minimal Assets/Liabilities: Yes Total Docket Entries: 156 Committee Appointed: No
Marc Voisenat	$450	1994	*In re Maiohua Wu, Case No. 21-30109*	Individual Debtor: Yes Firm Size: Sole Practitioner Minimal Assets/Liabilities: Yes

[1] For purposes of this analysis, assets and liabilities per the bankruptcy petition of less than $10 million each are considered "minimal."

[2] This information is included in order to help assess the complexity of the case.

Attorney	Billing Rate	Year Admitted	Case	Select Information Regarding Case and Counsel
				Total Docket Entries: 47 Committee Appointed: No
Michael H. Meyer	$525	1978	*In re Michele Louise Nessier, Case No. 20-31026*	Individual Debtor: Yes Firm Size: 2 attorneys Minimal Assets/Liabilities: Yes Total Docket Entries: 62 Committee Appointed: No
Brent D. Meyer	$375	2009		
Michael D. Lee	$500	2010	*In re Mary Jennings, Case No. 21-30132*	Individual Debtor: Yes Firm Size: 2 attorneys Minimal Assets/Liabilities: Yes Total Docket Entries: 112 Committee Appointed: No
Robert Goldstein	$550	1996	*In re Wendy Hemming, Case No. 16-30394*	Individual Debtor: Yes Firm Size: 2 attorneys Majority of time entries were 2016-2018, so this is not an example of current rates.
Merle C. Meyers	$680	1976	*In re Barett Evan Scherman and Susan Averbach Scherman, Case No. 20-30473*	Individual Debtor: No Firm Size: 3 attorneys Minimal Assets/Liabilities: Yes Total Docket Entries: 123 Committee Appointed: No
Kathy Quon Bryant	$500	2001		
Michele Thompson	$450	2005		
Simon Aron	$595	1983	*In re BSK Hospitality Group, LLC, Case No. 21-40686*	Individual Debtor: No Firm Size: 50+ attorneys Minimal Assets/Liabilities: Yes Total Docket Entries: 124 Committee Appointed: No
Johnny White	$550	2010		
Andrew H. Morton	$515	2010 (NY)	*In re Crosscode, Inc., Case No. 20-30383*	Individual Debtor: No Firm Size: 50+ attorneys Minimal Assets/Liabilities: Yes Total Docket Entries: 321 Committee Appointed: No
Matthew D. Metzger	$595	2005	*In re Hireclub.com, Inc., Case No. 21-30694*	Individual Debtor: No Firm Size: sole practitioner Minimal Assets/Liabilities: Yes Total Docket Entries: 69 Committee Appointed: No
Gregory A. Rougeau	$450	1998		Individual Debtor: No Firm Size: 2 attorneys

Attorney	Billing Rate	Year Admitted	Case	Select Information Regarding Case and Counsel
Kenneth A. Brunetti	$450	1991	*In re Don Ramon's Real Estate, LLC, Case No. 21-30191*	Minimal Assets/Liabilities: Yes Total Docket Entries: 65 Committee Appointed: No
Steven R. Fox	$475	1988	*In re Douce France, Case No. 20-30095*	Individual Debtor: No Firm Size: 2 attorneys Minimal Assets/Liabilities: Yes Total Docket Entries: 171 Committee Appointed: No
Michael St. James	$650	1980	*In re Jackson Street Equities, LLC, Case No. 21-30298*	Individual Debtor: No Firm Size: sole practitioner Minimal Assets/Liabilities: Yes Total Docket Entries: 77 Committee Appointed: No
Charles Maher	$550	1986	*In re Theos Fedro Holdings, LLC, Case No. 21-30202*	Individual Debtor: No Firm Size: 4 attorneys Minimal Assets/Liabilities: Yes Total Docket Entries: 196 Committee Appointed: No
Gregg Kleiner	$550	1989		
Jeffrey Fillerup	$550	1985		
Michael Isaacs	$550	1981		
Sarah M. Stuppi	$425	1982	*In re Theos Fedro Holdings, LLC, Case No. 21-30202*	Individual Debtor: No Firm Size: 2 attorneys Minimal Assets/Liabilities: Yes Total Docket Entries: 196 Committee Appointed: No
Jeffrey I. Golden	$750	1988	*In re Tali Corp. d/b/a BKR, Case No. 21-30254*	Individual Debtor: No Firm Size: 11 attorneys Minimal Assets/Liabilities: Yes Total Docket Entries: 137 Committee Appointed: No